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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/802,314	03/17/2004	Van Le Huynh	ECV-5539CON	3894

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EDWARDS LIFESCIENCES LLC	
One Edwards Way	
Irvine, CA 92614	

EXAMINER	
PELLEGRINO, BRIAN E	

ART UNIT	PAPER NUMBER
3738	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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In re Application of: :
HUYNH, VAN LE et al :
Serial No. 10/802,314 :
Filed: March 17, 2004 :
Docket: ECV-5539CON :
Title: LOW-PROFILE, PIVOTABLE HEART :
VALVE SEWING RING :

DECISION ON PETITION

This is a decision on the petition filed on December 21, 2009. Petitioner is requesting 1) withdrawal the holding of the Petitioner's Appeal Briefs submitted as "Non-Compliant"; and 2) withdrawal holding of abandonment. This petition is being considered pursuant to 37 CFR 1.181. No fee is required under this section.

The petition is DISMISSED.

Background

On July 13, 2009, the Board of Patent Appeals and Interferences (BPAI) found the appeal brief of September 22, 2008 defective. BPAI returned the appeal to the examiner with the notification mailed to the appellant. In particular, BPAI found that independent claims 1 and 11 are not in compliance with 37 CFR § 41.37(c) (v). On page 2 of the appellant's notification letter mailed by BPAI clearly stated the specific requirement of 37 CFR § 41.37(c) (v) so that the appellant may make necessary corrections. On July 20, 2009, the Patent Appeals Center also mailed a Notification of Non-Compliant Appeal Brief to the appellant requesting a corrected appeal brief. Paragraph 10 of the Notification of July 20, 2009 also explains the reasons why the appeal brief was defective. In response, the appellant filed a second supplemental appeal brief on August 21, 2009. However, the corrected appeal brief filed on August 21, 2009 remains defective. The examiner dismissed the appeal in the letter of November 23, 2009 in accordance with MPEP §

1215.04. In the letter to dismiss the appeal, the examiner gave a detailed explanation¹ for holding the second supplemental appeal brief of August 21, 2009 defective. Since the appeal was dismissed, the application was held abandoned. In response, on December 21, 2009, the appellant submitted a third supplemental appeal brief with the necessary corrections. On the same day, the appellant filed this petition for review by the TC Director under 37 CFR 1.181.

In the petition, petitioner requests the Director to a) overrule the holding of non-compliance dated November 23, 2009, or b) accept the filing of the third supplemental appeal brief correcting the deficiencies noted. Petitioner argues that in the July 20, 2009 Notice of Non-Compliance, Deborah L. Perry the Supervisory Paralegal Specialist failed to mention any substantive deficiency. Therefore, the August 21, 2009 second supplemental appeal brief fails correct the deficiency. Petitioner opines that there was a bona fide attempt made to address the deficiencies noted by replacing the published paragraph references with the corresponding page/line number references. That would appear to be a complete response based on the July 20, 2009 Notice of Non-Compliance. However, in the November 23, 2009 letter, the examiner requests further substance as to the claim element references. Therefore, petitioner now requests the examiner to accept the previously submitted second supplemental appeal brief of August 21, 2009 because petitioner believes the cited deficiencies were corrected by the second supplemental appeal brief. Specifically, Supervisory Paralegal Specialist Perry only enumerated technical deficiencies, nothing of substance. In the alternative, petitioner request the examiner to accept the third supplemental appeal brief which adds further references to the specification and drawings for claim elements in the independent claims.

Discussion and Decision

A review of the examination history shows that the appellant submitted appeal briefs after each response of a defective appeal brief, but failed to correct the brief with claims 1 and 11 being identified as claims involved in the appeal. In the letter from BPAI of July 13, 2009 and the defective appeal brief notice of July 20, 2009, it was clearly explained why the appeal brief of September 22, 2008 was defective and what needs to be corrected. There is absolutely no substantive correction required. The requirement of 37 CFR § 41.37(c) (v) is strictly a formality requirement. Therefore, petitioner's arguments regarding substantive deficiency is not persuasive. Based on the record, the dismissal of appeal was due to the appellant's failure to make the formality corrections as required by the BPAI. With no claims allowed from the

¹ A Non-compliant brief notice was sent out on 7/20/09 requiring Applicant to refer to claim limitations as explained in 37 CFR 41.37(c) (1) (v). The summary of claimed subject matter is to include a clear explanation of where claimed features and functions are set forth in the disclosure with reference to the specification by page and line number, and to the drawings by "reference characters" as the application has drawings showing features that are claimed and where they are referenced. Applicant submits a response reciting the claim limitations and in a separate paragraph lists a few figures and pages with lines of the specification "separately" from the claim limitations leaving it vague and unclear as to exactly what defines the specific limitations of the claims. Again, as the MPEP states for this section of the brief, the Applicant must provide "A concise explanation of the subject matter defined in each of the independent claims involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters. For each independent claim involved in the appeal and for each dependent claim argued separately under the provisions of paragraph (c) (1) (vii) of this section, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters.

application or any of the appeal briefs, the application was abandoned in accordance with MPEP § 1215.04.

With regard to the third supplemental appeal brief, while the appellant did present figure numbers to show two bi-stable positions, the appellant still failed to show or reveal where the limitation of "configured to pivot between bi-stable positions" is defined or explained in the specification so it can be understood by the Board as required by 37 CFR 41.37². In particular, the appellant still failed to refer the claimed "configured to pivot between bi-stable positions" by specification page and line number. Therefore, the third supplemental appeal brief remains defective. The requested relief to accept the third supplemental appeal brief filed on December 21, 2009 cannot be granted.

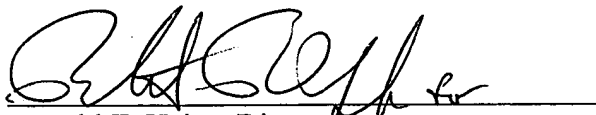
Conclusion

For the reasons stated above, the latest revised appeal brief filed on December 21, 2009 still remains defective. The holding of abandonment in accordance with MPEP 1215.04 is deemed proper. The relief requested cannot be granted.

PETITION DISMISSED.

Any request for reconsideration should include a cover letter entitled "Renewed Petition under 37 CFR 1.181" and must be submitted within TWO (2) MONTHS from the mail date of this decision. The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings (37 CFR 1.181(f)). No extension of time under 37 CFR 1.136(a) is permitted. A petition to revive under 37 CFR § 1.137, including the required fee and a compliant brief, should be separately filed and directed to the Office of the Deputy Commissioner for Patent Examination Policy at Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450. See MPEP 1002.02.

Any inquiry regarding this decision should be directed to Henry Yuen, Special programs Examiner at (571) 272-4856.


Donald T. Hajec, Director
Technology Center 3700

² 37 CFR 41.37 states the following: (v) *Summary of claimed subject matter*. A concise explanation of the subject matter defined in each of the independent claims involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters. For each independent claim involved in the appeal and for each dependent claim argued separately under the provisions of paragraph c(1)(vii) of this section, every means plus function and step plus function as permitted by 35 U.S.C. § 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function by page and line number, and to the drawing, if any, by reference numbers.